84-135

NO.

TWENTIETH CENTURY TRAVEL ADVISORS, INC. A CALIFORNIA CORPORATION dba TENDER LOVING CARE; L. A. MARK ROY CORP., A CALIFORNIA CORPORATION, dba CIRCUS MAXIMUS; JUNG SIK HON, an individual, dba TOKYO MASSAGE; AND FERNANDO AGUDELO, an individual, dba WEST L. A. MASSAGE,

Petitioners

vs.

PETER PITCHESS, individually, and in his official capacity as SHERIFF OF LOS ANGELES COUNTY, STATE OF CALIFORNIA

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

TWENTIETH CENTURY TRAVEL ADVISORS, INC., a California corporation, dba TENDER LOVING CARE; L. A. MARK ROY CORP., a California corporation; dba CIRCUS MAXIMUS; JUNG SIK HAN, an individual, dba TOKYO MASSAGE; and FERNANDO AGUDELO, an individual, dba WEST L. A. MASSAGE, Plaintiffs, v. PETER PITCHESS, individually, and in his official capacity as Sheriff of Los Angeles County, State of California, Defendant.	NO. CV 80-2687-RJK (Gx) MEMORANDUM OF DECISION AND ORDER

The plaintiffs, four massage parlors, Tender Loving Care, Tokyo Massage, Circus Maximus, and West Los Angeles Massage, filed a complaint on June 23, 1980, seeking a judgment declaring Section 592.3 of the Los Angeles County Business Ordinance,

Number 5860, unconstitutional and enjoining enforcement of the ordinance by the defendant, Sheriff Peter Pitchess. Section 592.3 requires massage parlors to cease operation between the hours of 10:30 p.m. and 7:00 a.m. and to exclude all customers, patrons, and visitors between those hours. It is the plaintiffs' contention that Section 592.3 violates the guarantees under the Fourteenth Amendment of the United States Constitution and of California Government Code, Section 51031(e).

On June 24, 1980, this Court issued a temporary restraining order prohibiting enforcement of the ordinance by defendant. The defendant has filed a motion for summary judgment. There being no material issues of fact in dispute between the parties, this matter is appropriate for summary determination. F.R. Civ. P. 56(c).

I. STATE CLAIM

The California Government Code Section 51031, authorizes local legislative bodies to license

massage parlor businesses. Section 51031(e) states:

> The ordinance may condition the issuance of a license to engage in the business of massage upon proof that a massage business meets the reasonable standards set by the ordinance, which may include, but need not be limited to, the following areas:
>
> . . .
>
> (e) hours of operation of the massage business.

The California Appellate Court in Brix v. City of San Rafael, 92 Cal. App. 3d 51, 154 Cal. Rptr. 647 (1979), found that an ordinance, identical to the one herein, was "reasonable" within the meaning of Section 51031(e), and that the ordinance was therefore a valid exercise of the city's power. The court felt that "The reasonableness of the ordinance is underscored by the fact that massage establishments are permitted to be open 15-1/2

hours each day, thereby providing ample time, for any person so inclined, to obtain a massage." Id. 154 Cal. Rptr. at 650. This Court similarly finds that Section 592.3 is a proper exercise of Los Angeles County's power under California Gov't Code Section 51031(e). The Court therefore must consider plaintiffs' contention that the ordinance violates the Fourteenth Amendment.

II. FEDERAL CLAIMS

When a statute or ordinance regulating economic activity is challenged on Fourteenth Amendment due process or equal protection grounds, the courts employ minimal scrutiny. See, e.g., New Orleans v. Dukes, 427 U.S. 297, 96 S.Ct. 2513 (1976); Ferguson v. Skrupa, 372 U.S. 726, 83 S.Ct. 1028 (1963); Williamson v. Lee Optical Co. 348 U.S. 483, 75 S.Ct. 461 (1955); Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 72 S.Ct. 405 (1952). If the regulation bears a rational relation to a legitimate state end, it is upheld. See, e.g. Nebbia v. New York, 291 U.S. 502, 54 S.Ct. 505

(1934). In this regard, the Supreme Court has said that "[a] law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it." Williamson v. Lee Optical Co., 348 U.S. 483, 487-88 (1955.) The courts are not concerned with the wisdom, need, or appropriateness of legislation and will not strike down laws regulating business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought. Id.

Applying the aforementioned view, the Supreme Court has upheld numerous regulatory laws against both due process and equal protection attacks. For example, in Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952), the Court upheld a law that required employers to give their employees four hours off from work with full pay in order to vote. In that case, the employers were paying wages for a period in which the employees were performing no

services, and, moreover, there was no evidence that the employees were spending any of the time at the polls. However, the Court held that the law bore a rational relation to a legitimate end, removing a practical obstacle to getting out the vote.

In Ferguson v. Skrupa, 372 U.S. 726 (1963), the Court upheld a Kansas law prohibiting anyone from engaging in the business of debt adjusting except as an incident to the lawful practice of law. That law had the effect of putting many persons engaged in debt adjusting out of business. There was no evidence that persons, other than lawyers, who engage in debt adjusting were doing anything immoral or dangerous. Nevertheless, the Court found no violation of due process or equal protection and said that Kansas was free to decide for itself what legislation was needed to deal with the business of debt adjusting.

In New Orleans v. Dukes, 427 U.S. 297 (1976), the Court found that a New Orleans provision exempting only those pushcart food vendors who had been in business for eight years prior to January 1, 1972 from a prohibition against such vendors in

the French Quarter did not violate equal protection or due process. That provision put all vendors who had been in business less than eight years out of business. Still, the Court reasoned that the law furthered the purpose which the city had identified as its objective: to preserve the appearance of the Quarter. Yet, there was no showing that vendors who had been in the French Quarter more than eight years prior to the enactment of the provision were operating in a manner more consistent with the Quarter's traditions than vendors who had been there less than eight years.

The plaintiffs' claim that they do not cause any more law enforcement problems than other late night businesses and, thus, should not be treated differently, is irrelevant. A law is constitutional even though it is not logically consistent with its aim in every respect, so long as the legislature believes that there is an evil needing correction and believes that the particular legislative measure is a rational way to correct it. Williamson v. Lee Optical Co., 348 U.S. 483 (1955). In the instant case, the Los Angeles Board

of Supervisors could reasonably have believed that there is an increase in criminal activity in massage parlors during the late evening and the early morning hours and that the ordinance would serve to reduce the risk of such illegal activity. In fact, the defendant claims that massage parlors are treated differently than supermarkets, theatres, laundromats, and donut shops because massage parlors present a greater potential for violations of public health, morality, and safety laws. Furthermore, the defendant asserts, Section 592.3 will enable the Sheriff's Department to decrease the use of their limited resources at massage parlors and to utilize them in other areas.

The plaintiff's contention, that they will lose between 65 percent and 80 percent of their patronage if they have to close between the hours of 10:30 p.m. and 7:00 a.m., is also irrelevant. The previously discussed cases make it clear that a law will not be invalidated if it is rationally related to legitimate end, as is Section 592.3, even though it may harm the business interests of specific persons.

Finally, the Fifth Circuit, in Harper v. Lindsay, 616 F.2d 849 (5th Cir. 1980) and in Pollard v. Cockrell, 578 F.2d 1002 (5th Cir. 1978), twice has upheld the validity of similar ordinances that prohibited the operation of massage parlors for specified hours of the late evening and early morning. The language employed in Pollard v. Cockrell, Id. at 1013, is particularly persuasive.

> [T]he distinction between massage parlors and the other institutions is not arbitrary or irrational. . . . the city council probably reasoned that . . . [other institutions dealing with therapy and grooming] are not likely to pose the danger--which the ordinance was intended to alleviate--of serving as subterfuges for prostitution. . . . appellants argue that [the section], regulating hours of operation, unconstitutionally discriminates against massage parlors because other

> establishments performing similar services are not similarly burdened . . . . this argument must fail. We note that even those cases invalidating massage parlor ordinances under [no longer valid] substantive due process principles have conceded that regulation of operating hours would be permissible.

Therefore, it is the determination of this Court, that the ordinance in question, regulating the hours of operation of massage parlors, does not violate either California law or the United States Constitution. Thus, on the undisputed facts, there are no grounds upon which this Court may grant the relief sought by plaintiffs. Accordingly, it is hereby ORDERED that defendant's motion for summary judgment is GRANTED. It is further ORDERED that the preliminary injunction, previously ordered to restrain enforcement of the ordinance, is hereby VACATED. It is further ORDERED that this action is DISMISSED WITH PREJUDICE.

The Clerk shall send, by United States mail, a copy of this Memorandum of Decision and Order to counsel for the parties.

DATED: May 22, 1981.

ROBERT J. KELLEHER
United States District
Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

TWENTIETH CENTURY TRAVEL ADVISORS, INC., a California corporation, dba TENDER LOVING CARE; L. A. MARK ROY CORP., a California corporation, dba CIRCUS MAXIMUS; JUNG SIK HAN, an individual dba TOKYO MASSAGE; and FERNANDO AGUDELO, an individual, dba WEST L. A. MASSAGE, Plaintiffs, vs. PETER PITCHESS, individually and in his official capacity as Sheriff of Los Angeles County, State of California, Defendant.	NO. CV 80-2687-RJK (Gx) JUDGMENT

Defendant having filed a motion for summary judgment in his favor, pursuant to F. R. Civ. P. 56 (c), on the grounds that there are no genuine issues of material fact and that he is entitled to judgment as a matter of law,

Now, on considering the motion, points and authorities, and other papers on file herein, due deliberation having been had, and in accord with

the memorandum of Decision and Order filed herein this date,

It is hereby ORDERED, ADJUDGED, AND DECREED that defendant's motion for summary judgment be, and the same hereby is, GRANTED. It is further ORDERED, ADJUDGED, AND DECREED that this action be DISMISSED WITH PREJUDICE.

The Clerk shall send, by United States mail, a copy of this Judgment to counsel for the parties.

DATED: May 22, 1981.

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ROBERT J. KELLEHER
United States District
Judge

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TWENTIETH CENTURY TRAVEL ADVISORS, INC., et al.,	)
Plaintiffs-Appellants,	)
vs	) NO. CA 81-5622) DC No. CV 80
PETER J. PITCHESS,	) 2687
Defendant-Appellee.	)MEMORANDUM

Appeal from the United States District Court
for the Central District of California
Honorable Robert J. Kelleher, District Judge
Presiding
Submitted September 30, 1982
Originally Decided February 4, 1983
Rehearing Granted and Disposition withdrawn
September 20, 1983
Decided: January 3, 1984*

BEFORE: CHOY, ALARCON and CANBY, Circuit Judges

* The panel finds this case appropriate for submission without argument pursuant to 28 U.S.C.A. 9th Cir. R. 3(a) and Fed. R. App. P. 34(b).

Plaintiffs-appellants, Twentieth Century Travel Advisers Inc., (Twentieth Century), brought suit under 42 U.S.C. Section 1983 for injunctive and declaratory relief. Twentieth Century attacked the constitutionality of Los Angeles County Massage Parlor Licensing Ordinance Section 592.3 that restricts the hours that such establishments may be open for business. The district court initially entered a temporary restraining order prohibiting the defendant, the Sheriff of Los Angeles County, from enforcing Section 592.3. That order was followed by a preliminary injunction. Subsequently, however, the district court granted the Sheriff's motion for summary judgment from which Twentieth Century appeals. We affirm.

Twentieth Century argues that Section 592.3 offends the due process and equal protection clauses of the fourteenth amendment. The standard for evaluating ordinances claimed to be violative of due process or equal protection is whether a rational basis exists for the police power exercised or classification established by the

ordinance. Autotronic Systems, Inc. v. City of Coeur D'Alene, 527 F.2d 106, 108 (9th Cir. 1975)(per curiam). Appellants do not contest this minimal standard but contend that the district court made an erroneous finding "that the Los Angeles County Board of Supervisors could reasonably have believed that there is an increase in criminal activity in massage parlors during the late evening and the early morning hours and that the ordinance would serve to reduce risk of such illegal activity."

Twentieth Century relies on People v. Glaze, 27 Cal. 3d 841, 614 p. 2d 291, 166 Cal. Rptr. 859 (1980) and Pentco, Inc. v. Moody, 474 F. Supp. 1001 (S.D. Ohio 1978). We find Glaze distinguishable, and we are not persuaded by Pentco.

In Glaze, an ordinance restricting the operating hours of picture arcades was held unconstitutional as a violation of the first amendment. A higher standard of review is required in cases involving restrictions of activities protected by the first amendment and no first amendment claim is made here. The Glaze opinion

states unequivocally that "[t]he law is clear that a municipality has the general power to regulate commercial businesses where the regulation is reasonable and non-discriminatory. For example, it is permissible under a municipality's police powers to reasonably restrict the hours of operation of an economic enterprise." Glaze, 614 P.2d at 294.

In Pentco, Inc., the United States District Court for the Southern District of Ohio, struck down as arbitrary and not reasonably related to a legitimate government interest a section of an ordinance that restricted the operating hours of a massage establishment. The court relied on an Ohio Supreme Court case concerning operating hours for barbershops. But a regulation's reasonableness depends on the nature of the regulated business and "the degree of threat that the operation of such business presents to the tranquility, good order, and well-being of the community at large. So long as a 'patent relationship between the regulations and the protection of the public health, safety, morals, or general welfare' exists, the regulations will be considered reasonable." Brix v. City of

San Rafael, 92 Cal. App.3d 47, 154 Cal. Rptr. 647, 650 (1979), quoting 7978 Corporation v. Pitchess, 41 Cal.App. 3d 42, 115 Cal.Rptr. 746, 749 (1974).

We conclude that the ordinance at issue here is reasonably related to a legitimate government interest and does not violate either the due process or equal protection clauses of the fourteenth amendment. The majority of courts that have considered this issue agree. See, e.g., Harper v. Lindsay, 616 F.2d 849 (5th Cir. 1980); Saxe v. Breir, 390 F.Supp. 635 (E.D. Wis. 1974). The wisdom of the ordinance or its usefulness in achieving its objectives is not for us to decide; it is enough that the ordinance is not palpably unreasonable, arbitrary or capricious and that its enactment is within the police power of Los Angeles County.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TWENTIETH CENTURY TRAVEL ADVISERS, INC., et al.	)
	) NO. 81-5622
Appellants,	)
	)
vs.	) DC CV-80-2687
PETER PITCHESS etc.,	) RJK
	) CENTRAL
Appellees.	) CALIF.
	) ORDER

BEFORE: CHOY, ALARCON and CANBY, Circuit Judges:

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.